COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

FIBER TECHNOLOGIES NETWORKS, L.L.C., Complainant	)	
v.	)	D.T.E. 01-70
SHREWSBURY'S ELECTRIC LIGHT PLANT, Respondent	)	

SHREWSBURY'S ELECTRIC LIGHT PLANT'S COMMENTS ON PROPOSED PROCEDURAL SCHEDULE, SCOPE OF PROCEEDINGS AND OPPOSITION TO MOTION OF FIBER TECHNOLOGIES NETWORKS, L.L.C TO CHANGE THE ORDER OF PRESENTATION

Pursuant to the Hearing Officer's instructions, issued at the procedural conference in the above-captioned matter on October 18, 2001, and 220 C.M.R. 1.04(5)(c), the respondent Shrewsbury's Electric Light Plant hereby files its comments on the proposed procedural schedule in this matter and the scope or proceedings, and its opposition to the motion of Fiber Technologies Networks, L.L.C. ("Fibertech") to change the order of presentation under the proposed procedural schedule.

As an initial matter, SELP believes that this dispute can be adjudicated without the need for pre-filed testimony, evidentiary hearings, and direct and cross-examination of witnesses. Indeed, SELP submits that the Department of Telecommunications and Energy ("DTE" or "Department") can adjudicate this dispute solely on the pleadings, and by taking notice of official documents. Fibertech, a dark fiber company, requested permission from SELP, a municipal utility, to attach to SELP's poles. SELP refused, and stated that its reason for denial is that Fibertech is not the type of entity entitled to

attach to SELP's poles by law. Fibertech is not a "licensee" and its facilities are not "attachments" as those legal terms are specifically defined by the Massachusetts Legislature in G.L. c. 166, § 25A. SELP does not dispute that it denied Fibertech the request for attachment. Fibertech disputes that it is not a "licensee" and that its dark fiber is not an "attachment" under G.L. c. 166, § 25A, and 220 C.M.R. 45. 02. This states the entire case before the Department, and all of it rests upon the Department's interpretation of the statutory terms; in other words, questions of law.

No formal hearing is required for pole attachment disputes under the relevant statute, G.L. c. 166, § 25A. See Boston Gas Co., et al., D.T.E. 99-76 at 13 (1999). In fact, the Department, in implementing the pole attachment regulations, clearly envisioned that matters under 220 C.M.R. 45.00 could be adjudicated without the need for formal hearings since there is a set of procedures to follow when the parties agree to waive their rights to formal hearings. 220 C.M.R. 45.06. In the only other case to date to arise under 220 C.M.R. 45.00, the parties waived their rights to a formal hearing and pre-filed testimony, a technical session was held, and discovery was issued. Hearing Officer Rulings on June 6, 2001 in Metricom Inc., D.T.E. 01-40 (2001). The scope of that proceeding was limited to the very same questions before the Department in this proceeding, except instead of a wireless company, this involves a dark fiber company attempting to utilize the provisions of 220 C.M.R. 45.00.

However, Fibertech refuses to agree to such a waiver, and insists that full formal hearings with examination of witnesses, (including presentation of expert testimony)[1] are necessary for adjudication of

[1] Since there are no disputed facts, it is unclear what the subject of such "expert testimony" would be or why, in a case involving clear questions of law with no material facts in dispute, it is relevant. An expert's opinion on why, as a matter of law or public policy, an entity such as Fibertech should be permitted to attach its facilities to a pole, or the importance of developing dark fiber infrastructure in Massachusetts, is not the type of "evidence" relied upon by reasonable people in adjudication of a denial of a pole attachment request. See 220 C.M.R. 1.10(1). Such matters belong before the Legislature, as part of an effort to amend G.L. c. 166, § 25A to include dark fiber that transmits no intelligence in the definition of "attachment."

this dispute. It is unclear why Fibertech insists on proceeding with its request for formal hearings when this matter is simply a denial of access case involving the threshold issue of whether Fibertech can even utilize the complaint provisions of 220 C.M.R. 45.00 as only a dark fiber company. There are no attachment rates or formulas to be examined in this matter; there are not even issues regarding the amount of capacity on SELP's poles, or safety, reliability or generally applicable engineering standards (which issues are not reached under the Department's regulations unless the company that has been denied access is a "licensee" and has proposed an "attachment.")

Clearly, Fibertech hopes to greatly expand the otherwise limited scope of proceedings, as evidenced by its motion to change the order of presentation. In essence, Fibertech will attempt to expand this matter into a generic proceeding regarding the expansion of the existing definitions found at 220 C.M.R. 45.02, probably on the basis of public policy reasons, since current law requires those attaching to transmit intelligence by television, telephone or electricity.[2] Of course, the Department must conform any interpretation of the definitions found at 220 C.M.R. 45.02 to those contained in the statute setting forth its authority in this area, G.L. c. 166, § 25A.[3] E.g., New Bedford v. Energy Facilities Siting Council, 413 Mass. 482, 487 (1992); Greater Boston Real Estate Board v. Mass. Dept. of Telecommunications and Energy, No. 2000-04909A, Superior Court of Massachusetts, August 16, 2001, by Sikora, J. Otherwise, if Fibertech could even remotely fit within the existing definitions, we would not be before the Department today, and Fibertech surely would not be pushing to file testimony.

[2] If such a generic proceeding is to occur, SELP respectfully suggests that the DTE notice such a proceeding so that it would be open to all those seeking possible pole attachments, utilities owning poles, and cities and towns making decisions under G.L. c. 166, § 22.

As SELP has stated repeatedly in its response to Fibertech's complaint, the issues before the Department in this proceeding are quite simply 1) whether Fibertech's dark fiber is an "attachment" within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02; 2) whether Fibertech can be a "licensee" under G.L. c. 166, § 25A and 220 C.M.R. 45.02; and 3) whether based on the answers to the preceding questions, can Fibertech avail itself of the complaint procedures under 220 C.M.R. 45.04. These questions involve pure interpretation of law; and in SELP's view, the Department already has all of the "evidence" it needs to decide Fibertech's complaint on the merits. Thus, the issues before the Department are very straightforward, and consist solely of questions of law the resolution of which will not be aided by pre-filed testimony and examination of witnesses. If necessary, the parties could file a joint stipulation of facts to help further focus the questions before the Department. 220 C.M.R. 1.01(8). There is ample precedent for the submission of joint stipulations of facts to avoid unnecessary hearings and testimony. E.g., CTC Communications, D.T.E. 98-18 at 1 (1998); Hull Municipal Light Plant, D.P.U. 87-19-A (1990) aff'd sub nom. Bertone v. Dept. of Pub. Utils., 411 Mass. 536 (1992). SELP believes that this approach would promote efficiency while preserving the limited resources of both the Department and SELP, a public entity.

SELP, and any other utility that owns and controls a pole, does not need to provide any further reasons for denial if it determines that the entity seeking to attach to its poles is in fact, not entitled to pursuant to the provisions of G.L. c. 166, § 25A and 220 C.M.R. 45.00. If the entity, like Fibertech, is not a "licensee," and it does not propose to place an "attachment" on a pole, then a utility need not entertain a request further. This is how SELP has proceeded to date with regard to Fibertech.

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[3] See also Application for Competitive Supplier License by Hampshire Municipal Electric Cooperative at p. 1 (September 28, 2001). The Department, in denying the proposed Cooperative's license ruled that "statute, not

Requiring the denying utility in such circumstances to provide additional reasons such as capacity or to engaging in a fishing expedition via unnecessary discovery for any other possible reasons underlying the denial (for example, Fibertech hinted at the procedural conference that it wanted to determine if SELP is a "competitor" – SELP was unaware that Fibertech is providing cable television service or the like over unlit fiber) is inappropriate and unwarranted under the statute and regulations. Pre-filed testimony and hearings are a misuse of crucial Department resources. SELP, as a public entity, respectfully states that its funds should not be misused in preparing and analyzing testimonies and attending hearings in a case where such expenditures are not necessary. SELP's proposed schedule without testimonies and hearings also assures a timely and even expedited decision. This is supposedly what Fibertech wants.

SELP proposes that the Department, in its ruling on the procedural schedule, clearly set forth the scope of these proceedings. If the informal statements by Fibertech at the procedural conference in this matter regarding the nature of the testimony it plans to offer in this matter are any indication, it is highly likely that Fibertech will attempt to introduce extraneous issues, broad public policy matters, and confusion of the real "triable" issues in this matter via the formal hearing process. This will not aid in the efficient adjudication of the dispute before the Department. SELP will have to object to all irrelevant and inappropriate matters that Fibertech intends to introduce either through discovery or testimony (such as legal argument masquerading as expert or other opinion). Fibertech will oppose the objections. Proceedings will invariably be delayed.

Further, Fibertech's motion to reverse the order of presentation of pre-filed testimony should be denied. (SELP submits that this testimony is wholly unnecessary.) Fibertech argues that it is "appropriate" for SELP to be assigned "the burden to go forward with evidence to justify its denial of

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agency discretion governs Department action on its application."

access to Fibertech." Fibertech Motion to Change the Order of Presentation, p. 2. However, 220 C.M.R. 1.06(6)(f) has always provided that the complainant opens and closes any case. The Department's Proposed Procedural Schedule (October 16, 2001) also consistently follows its regulations and precedent with the Petitioner's testimony being filed first and then the Respondent's testimony being filed. In support of its proposal, Fibertech provides an entirely irrelevant synopsis of the FCC's policy behind Section 224 of the Telecommunications Act of 1996, and the Department's "pro-competitive" stance in implementing pole attachment regulations. However, there is no "competitor" rule applicable to the assignment of burdens of proof. Further the Department has its own regulations on pole attachments and G.L. c. 166, § 25A, which govern here.[4]

Requiring SELP to provide pre-filed testimony first will be futile. SELP has already stated the reasons for its denial in the pleadings. At this time, SELP has nothing else to add. There are no disputed facts. Fibertech requested an attachment; SELP denied it for the reasons it stated in its letter, and again in its response to the complaint. Indeed, SELP would not and could not have pre-filed testimony to file first. In addition, Fibertech has changed its "strategy" so many times already, SELP would need to have Fibertech's pre-filed testimony to be filed first so it could actually rebut whatever Fibertech's case is at the current moment. For example, in its Complaint, it appeared that Fibertech would argue that its dark fiber operations are actually those of a "common carrier" under G.L. c. 159; now it seems prepared to argue for an expansive reading of G.L. c. 166, § 25A to include dark fiber on public policy grounds.

[4] Although irrelevant, SELP is not Fibertech's "competitor." Since Fibertech provides no service that SELP provides, because dark fiber cannot transmit anything, they are not "competing."

If the Department allows pre-filed testimony in this dispute, SELP also respectfully requests the right to seek discovery and receive responses on Fibertech's pre-filed testimony before SELP has to file its pre-filed testimony. SELP, as the respondent, has a right to ask and receive discovery on the complainant's case (i.e., pre-filed testimony). This basic due process right has been recognized by the Department in cases such as this one for time immemorial.

Finally, SELP's proposals for procedural schedules are as follows. SELP presents two options, the non-hearing option and the hearing option. For the reasons set forth above, SELP believes pre-filed testimony and evidentiary hearings are unnecessary, that any questions can be resolved through an informal technical conference, and that the parties can file a joint stipulation of facts to further obviate the need for hearing. Further, SELP requests that in the event that the Department determines hearings are in fact necessary, that Fibertech's motion to change the order of presentation be denied.

Proposed Procedural Schedule/ No Hearings

Discovery begins on rolling basis	November 2
Last day to issue discovery	November 9
Final discovery responses due	November 16
Hearing only to move responses into record And resolve any outstanding discovery disputes	November 26
Simultaneous Initial Briefs due	December 3
Simultaneous Reply briefs due	December 14

Proposed Procedural Schedule/Evidentiary Hearings

Pre-Filed Testimony of Fibertech	November 2
Discovery by SELP on Fibertech Testimony	November 9

Fibertech's Responses to SELP Discovery	November 16
Pre-filed Testimony of SELP	November 23
Discovery of Fibertech	November 30
SELP's Responses to Fibertech Discovery	December 6
Evidentiary Hearings	December 11, 12
Simultaneous Initial Briefs due	December 29
Simultaneous Reply Briefs due	January 11, 2002

Please note that SELP's proposed procedural schedule on evidentiary hearings should not be construed as a waiver of its argument that evidentiary hearings are wholly unnecessary in this dispute, and reflects SELP's argument that Fibertech's motion should be denied.

Respectfully submitted,

SHREWSBURY'S ELECTRIC
LIGHT PLANT

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